FILE COPY

IN THE

Supreme Court of the United States

No. 648

Term, 194

ALLEN GORDON FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Allen Gordon Foster, respectfully prays that a *writ of certiorari* issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit dated February 5, 1948, affirming a judgment of the District Court for the Southern District of New York convicting petitioner on two counts of violating the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. A. App. Sec. 311 by submitting and conspiring to submit false statements to secure an occupational deferment for Serge M. Rubinstein.

The sentence imposed by the District Court as affirmed by the Circuit Court was as follows: Petitioner was sentenced to imprisonment for two years and fined $5,000. on each of those counts, the prison sentence was suspended and he was placed on probation for a period of five years (2192a). The total fine therefore was $10,000.

A. STATEMENT OF THE CASE.

Under an indictment returned January 30, 1946, petitioner together with Rubinstein was indicted in counts two and three of a five count indictment with having committed offenses under Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. A., App. Sec. 311, hereinafter referred to as "the Act".

The trial before the Honorable J. F. T. O'Connor, District Judge and a jury in the United States District Court, Southern District of New York lasted from March 4, 1947 until April 22, 1947. Petitioner was found guilty as charged. The Circuit Court of Appeals for the Second Circuit affirmed.

The governing provision of the Act subjects to punishment "any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness, or liability or nonliability, of himself or any other person for service . . . "(for full text see Appendix A).

Count 2 charged that on February 2, 1943, Foster and Rubinstein submitted and caused to be submitted an occupational questionnaire form 42-A which contained the following false and fraudulent statements:

> "(a) That because of the character of Serge M. Rubinstein's functions, the successful continuance of the operations of Panhandle Producing and Refining Co., Midway Victory Oil Co. and Panhandle Steel Products Co. depends upon his remaining with the said companies;
>
> (b) That it is impossible to replace Serge M. Rubinstein without seriously impairing the drilling program and otherwise hampering the activities of the Panhandle Producing and Refining Co., Midway Victory Oil Co. and Panhandle Steel Products Co."

Count 3 charged that petitioner and Rubinstein conspired to commit the substantive offense charged in Count 2.

Prior to January 24, 1943, Rubinstein had been given an occupational deferment and classified II-B. His Local Board on that date notified him that his deferment to May 25, 1943, was to be reopened (78a). Upon his request, the Board accorded him a hearing on February 2, 1943.

Prior to the hearing on that evening Foster was in the office of Hugh Duffy, Secretary and Director of the companies. Rubinstein's secretary brought a form 42-A to Duffy who started to read it (357a). This form is an affidavit as to occupation, which is executed by the employer. Rubinstein then came in, took the form from Duffy and gave it to petitioner who then said that he would like to read it.

Rubinstein said it was not necessary for petitioner to read it; that petitioner could sign it and Rubinstein would explain it to him on the way uptown. It would appear that petitioner's presence was merely accidental since an accompanying letter (G. Ex. 15-B) was being prepared for Duffy's signature (358a) and there was no evidence that petitioner was in the office for the purpose of signing anything (358a).

Both Duffy and petitioner signed G. Ex. 15-B but petitioner alone signed Form 42-A (G. Ex. 15-A). Both documents however contain substantially the statements alleged to be false in the indictment.

Petitioner signed the affidavit as director and officer both of Midway Victory Oil Company and Panhandle Producing & Refining Company and as an officer of the Panhandle Steel Products Company.* Shortly thereafter Rubinstein appeared at the local board and submitted for its consideration a group of papers (G. Ex. 15 to 15-I)

* Foster was not in fact an officer of Panhandle Steel Products Company but the indictment makes no charge of falsity in this respect.

one of which was the form 42-A (G. Ex. 15-A) signed by petitioner, which, as noted above, contained the statements alleged in the indictment to be false.

These papers also set forth that Rubinstein was President of Midway Victory Oil Company; President of Panhandle Producing and Refining Company; President of Panhandle Steel Products Company; and that he was in charge of the general management, supervision, and operations of each company. These statements were all true, and were not charged to have been false.

B. THE QUESTIONS PRESENTED.

The following questions arise:

1. Where the Act makes criminal false statements as to "nonliability" for service and the Act as well as the penal section thereof distinguishes between "nonliability" and "deferment," are false statements made merely for the purpose of "deferment" criminal? (Requests for Charge 3, 10, 45, 46, 62, 63, 71, 72, 95 (2195a-2206a), Denied (2151a-2161a)).

2. Are not assertions that the successful continuance of corporate operations depends upon its chief executive officer remaining with it and that it is impossible to replace him without seriously impairing the activities of the corporation, merely expressions of opinion and expectation and not "false statements" such as are proscribed by the Act? (Counts two and three) (Requests for Charge 6, 7, 47, 48, 49, 50 (2193a, 2199a-2200a), Denied (2152a, 2156a)).

3. Was it error for the Court to refuse a point for charge that no conviction could be had upon a finding that the corporations were not engaged in the war effort to the extent claimed, where the prosecution presented such proof but the indictment contained no charge of falsity in that respect? (Requests for Charge, 55, 56, 58 (2200a-2201a), Denied (2156a)).

4. Does the evidence sustain petitioner's conviction? (Motion for Judgment of Acquittal, 2146a, 2185a; Denied, 2146a, 2185a).

C. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Court below has decided important questions of federal criminal law which have not yet been, but which should be, settled by this Court; it has also decided such questions in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals, as hereinafter set forth:

1. The indictment charged petitioner, in accordance with the penal section of the statute, with making false statements as to "nonliability" for service. However, the statements set forth in the indictment and shown by the evidence were not statements as to nonliability but as to deferment only, which are not made criminal by the Act. "Nonliability" and "deferment" are different. The former does not include the latter and throughout the Act and particularly in the penal section the sharp distinction is clearly made.

The court below, although conceding this distinction, affirmed petitioner's conviction anyway. Under the guise of ascertaining the legislative intent, it supplied judicially what it virtually conceded was a *casus omissus* in order to avoid what it thought would be a "loophole." This constitutes unacceptable judicial legislation often condemned by this Court. *U. S. v. Weitzel,* 246 U. S. 533 and examples under Note 2; *Ebert v. Posten,* 266 U. S. 548; *Todd v. U. S.,* 158 U. S. 278; *U. S. v. Harris,* 177 U. S. 305; *Viereck v. U. S.,* 318 U. S. 236. The court below altered by judicial construction the unambiguous words of a statute which imposes criminal penalties so as to punish one not otherwise within its reach.

The coverage of the penal section of this important federal criminal statute is an issue of first impression in

the federal courts and should be settled by this Court, so that if it is ever again necessary to use it, its meaning will be clear, or it will have been amended. A denial of certiorari will not settle the question.

2. In holding that an assertion of an opinion, particularly as to the future, is punishable as a "false statement" within the meaning of the Act, the court below acknowledged a conflict between its holding and that of the Court of Appeals of the District of Columbia in *Chaplin v. U. S.*, 157 Fed. 2d 697 (App. D. C. 1946). Other Circuit Courts, deciding the same issue under other federal statutes, are also in conflict. *Biddle v. U. S.*, 156 Fed. 759, 764 (C. C. A. 9, 1907); *Little v. U. S.*, 73 Fed. 2d, 861, 868 (C. C. A. 10, 1934). See also *Sawyer v. Prickett*, 19 Wall. 146; *Gordon v. Butler*, 105 U. S. 553, 557.

In reaching the present decision the court below created the novel doctrine that administrative hardship relieves the prosecution of the burden of proving guilt as defined and limited by the statute.

3 The court below countenanced a violation of petitioner's fundamental right to be convicted only upon a charge fairly made and fairly tried. The prosecution introduced evidence to show that the corporations were not engaged in the war effort to the extent petitioner claimed. But this was not the charge in the indictment, and while the evidence was admissible on the question of intent, *no conviction* could properly rest upon such proof. The trial court refused petitioner's request so to charge and the court below sustained the conviction. The conviction may well have rested on this invalid ground alone, whether or not it also could have rested [illegible] a valid one. This flouts *Stromberg v. California*, 2[illegible] 359 and *Williams v. North Carolina* 317 U. S. 287.

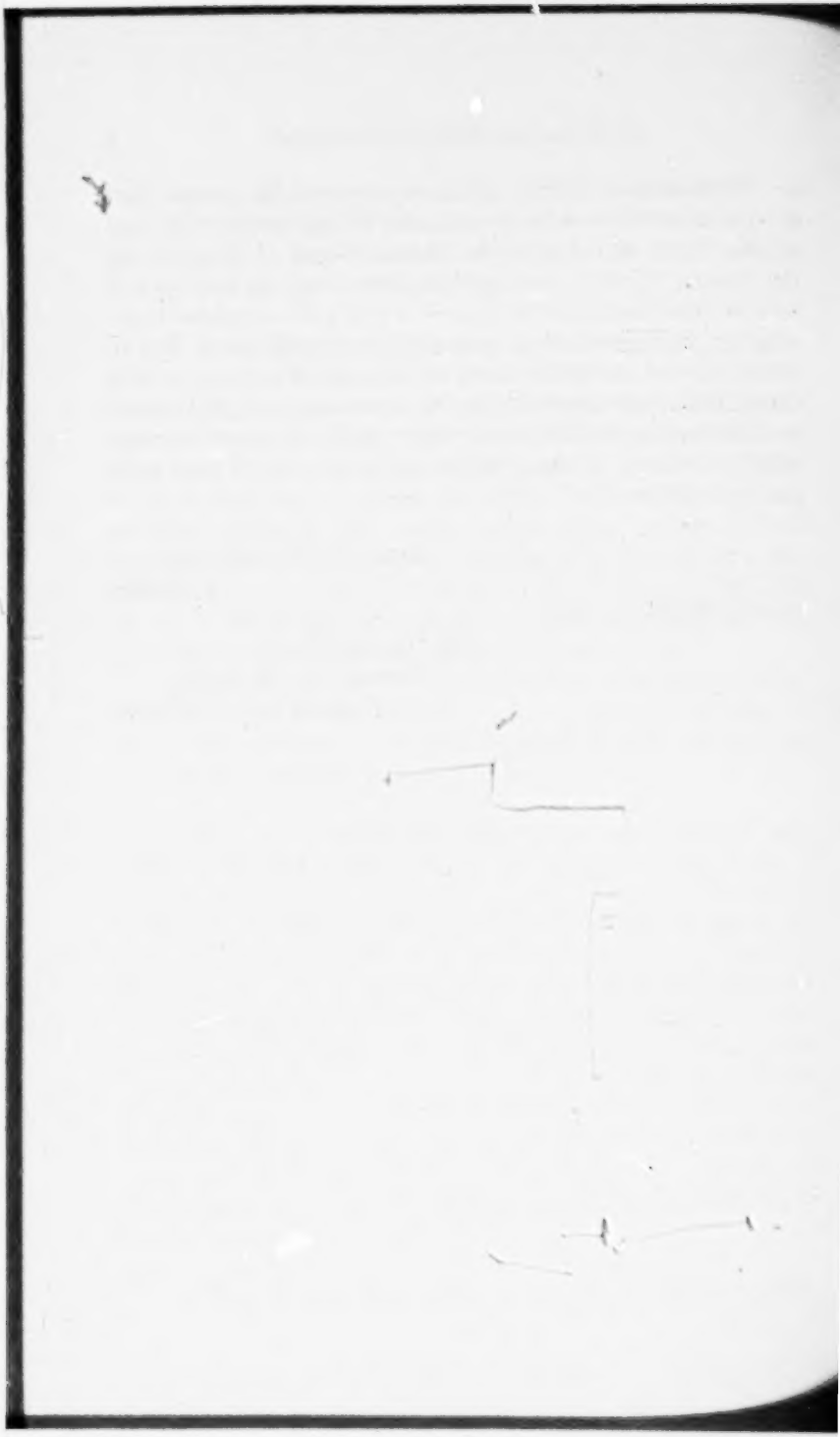
4. The Prosecution failed to prove petitioner's guilt.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said cause and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

ALLEN GORDON FOSTER,
Petitioner.

Dated: March 4, 1948.

By GEORGE WOLF,
THOMAS D. MCBRIDE,
Counsel for Petitioner.



BRIEF IN SUPPORT OF PETITION.

ARGUMENT.

I.

Statements (as to Occupation) Made for the Purpose of Deferment Are Not Statements as to Nonliability for Service.

The Act proscribes false statements as to nonliability for service. It does not proscribe false statements as to deferment.

The indictment charges petitioner, in accordance with the statute, with making and being party to the making of false statements as to his nonliability for service. The prosecution showed that petitioner was a party to the making of certain statements with respect to Rubinstein's occupation for the purpose merely of obtaining a deferment. As a matter of fact in requesting deferment, Rubinstein conceded his liability for service.

Obviously petitioner cannot be guilty of making a false statement in violation of the Act if the declaration proved is not a statement as to "nonliability for service." "Liability for service" means the legal obligation to serve. Not all who were subject to the legal obligation to serve were inducted by means of the draft system into the armed forces. Some were deferred temporarily and inducted later; some were deferred and never inducted. "Nonliability for service" means the absence of a legal obligation to serve.

The Act creates this clear legal distinction between "nonliability for service" and "deferment." Those liable for service are eligible for deferment under Section 5 of the Act, 50 USCA, Appendix Section 305 (c) (e) (k); and every person liable for service under the Act remains liable

despite deferment: cf. Selective Service Regulations Arts. 622.11, 622.22-2, 622-25-2, 622.31-2, 622.36, 622.71, 626.1.[1]

On the other hand one who is not liable for training and service is not subject to future induction; his status is fixed and he is no longer subject to liability under the Act. § 3 of the Act, 50 U. S. A. App. § 303 (a); *U. S. v. Cain*, 147 Fed. 2d 449 (C. C. A. 2, 1945).

The Act makes liability for service the general rule. Then, after setting forth certain categories of males who are relieved from such liability,[2] the Act provides that of

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[1] Senator Sheppard, Chairman of the Senate Committee on Military Affairs, analyzing the provisions of the bill on the Senate floor, said (86 Cong. Rec., pp. 10093-10094):

"Those who are liable for service will be classified depending upon their degree of availability for military service; but *all, regardless of their classification, will continue to be liable for military service.* • • •

"• • • The words 'who are liable for such training and service, but who are not deferred after classification' are a further indication that *liability continues regardless of deferment.*" (Emphasis supplied.)

[2] Various provisions of the Act grant *relief from liability for training and service.* There are several categories of persons who are thus relieved from liability.

1. Citizens or subjects of a neutral country, who prior to induction apply to be relieved from liability. Section 3 of the Act, 50 USCA App. § 303 (a).

2. In time of peace, one who completes at least 12 months training and service in the land forces and who thereafter serves satisfactorily in the regular Army or in the active National Guard for a period of at least two years. Section 3 of the Act, 50 USCA App. § 303 (c).

3. Section 5 of the Act (50 U. S. C. A. App. § 305 (a)) lists categories and groups, who are not required even to register, and who are relieved from liability. Apart from officers and men of the armed forces, this provision includes "persons in other categories to be specified by the President, residing in the United

those who rémain liable to serve, in the process following registration, the local boards, upon consideration of the facts, may either select registrants for induction or grant (1) exemptions; (2) deferments; or (3) postponements of induction.[3]

Numerous sections throughout the Act clearly disclose the sharp distinction made between *nonliability for service,*

States, who are not citizens of the United States, and who have not declared their intention to become citizens of the United States. . . ."

4. The same section of the Act, 50 U. S. C. A. App. § 305 (b) provides that in peace time certain categories are relieved from liability for training and service. These are mainly individuals who have served in a specified time and manner in the regular Armed Forces or in the National Guard or reserve components of the Armed Forces.

[3] Statutory authority for such draft board action prior to induction is as follows:

(1) *Exemptions.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (d) grants an exemption to regular or duly ordained ministers of religion and certain theological students.

The same section of the Act, 50 U. S. C. A. App. § 305 (g), grants an exemption from combatant training and service under certain conditions to conscientious objectors.

(2) *Deferments.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (c) (e) (k) provides that certain categories shall be deferred. These include deferments for elected and appointed officials, occupational deferments, dependency deferments, physical and mental deficiency deferments, marital deferments and certain others.

(3) *Postponement of Induction.*

Section 5 of the Act, 50 U. S. C. A. App. § 305 (f), provides for the postponement of the induction of certain high school students.

on the one hand, and *exemption, deferment* or *postponement* of induction, on the other.[4]

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[4] Section 3 of the Act, 50 U. S. C. A. App. § 304, provides that the "selection of men for training and service under section 3 . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, *from the men who are liable for such training and service* and who at the time of selection are registered and classified *but not deferred or exempted.*" The same section of the Act, 50 U. S. C. A. App. § 304 (b), in dealing with quotas refers to men "who are *liable for such training* and service but who are *not deferred after classification.*"

Section 5 of the Act, 50 U. S. C. A. App. § 305 (h) provides "No exception from registration, or exemption or *deferment* from training and service, under this Act, shall continue after the cause therefor ceases to exist." (Significantly, liability for service is omitted.)

Section 5, 50 U. S. C. A. App. § 305 (l) dealing with finality of the President's determination in matters of this kind states, "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or *deferment* from, training and service under this Act; and the determination of the President shall be final."

Section 5 of the Act, 50 U. S. C. A. App. § 305 (m) in providing for a quasi deferment to married men, married prior to December 8, 1941, with children, states that they "will be inducted after the induction of other registrants not *deferred, exempted, relieved from liability,* or *postponed from induction under this Act.* . . ."

Section 7 of the Act, 50 U. S. C. A. App. § 307 in prohibiting bounties for enlistment or induction, substitutes and payments to escape service, provides that "no person *liable for training and service* shall be permitted to escape such training and service or be discharged therefrom prior to the expiration of his period of such training and service by the payment of money or any other valuable thing whatsoever as consideration for his release from such training and service or *liability therefor.*"

Section 10, 50 U. S. C. A. App. § 310 (a) (2) which sets up the administrative provisions of the Act provides, inter

Repeated references throughout the Act to the word "deferment" show that when Congress proscribed conduct relating to deferment it specifically said so. This is well illustrated in the Penal Section itself (Section 11), for there Congress expressly distinguished between deferment and nonliability for service. *Only those who are charged with the duty of enforcing the Act* are subject to criminal liability for the making of a "false . . . registration, classification, physical or medical examination, deferment, induction, enrollment, or muster . . .", whereas *any person* who makes a false statement as to "fitness or unfitness or liability or nonliability" commits a criminal offense.

The Circuit Court of Appeals recognized the validity of this argument (2231a). But the court refused to apply it here because it would mean that there was a "loop-hole" in the penal provision of the Act. The court felt that Congress could not so have intended (2233a).

The obvious answer to such reasoning is that courts are bound by what Congress said where, as here, the language is clear, and cannot act upon what Congress did not say, nor upon what the court thinks Congress should have said. The action by the court below in departing from this accepted judicial standard is a clear case of judicial legislation. *Viereck v. United States,* 318 U. S. 236 (1942).

In supporting of its conclusion, the court below pointed out that in the Selective Draft Act for the First World

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alia, for jurisdiction of the local boards to determine all questions or claims with respect to "inclusion for, or exemption or *deferment* from, training and service under this Act of all individuals within the jurisdiction of such local boards."

Section 11, 50 U. S. C. A. App. § 311, the criminal offense section, proscribes the making of a "false . . . registration, classification, physical or mental examination, *deferment,* induction, enrollment or muster" by one who administers the Act but in the same sentence prohibits the making by any person of a false statement only as to "*nonliability for service.*" (Emphasis supplied throughout.)

War (Act of May 18, 1917, 40 Stat. 78), false statements concerning liability for service and false statements concerning "partial military service" were both punishable (2233a). In view of that, the court reasoned that "nonliability" as used in the penal section of the 1940 Act, patterned as it was after the 1917 Act, was broad enough to include "deferment," holding that "deferment" under the 1940 Act was substantially indentical with "partial military service" under the 1917 Act (2233a).

But these concepts are not only dissimilar; they are contradictory. Partial military service under the 1917 Act involved induction into service for limited duty; it corresponded to "limited service" in World War II, which likewise involved induction into the armed forces. Deferment on the other hand involves no present induction. Hence it stands between nonliability on the one hand which negates any service at all, and service, whether full, partial or limited, on the other hand.

There could be no more convincing argument that Congress deliberately omitted making false statements as to deferment criminal, than to compare the Selective Draft Act of 1917 with the Selective Training and Service Act of 1940. In the 1917 Act there was no provision whatever for deferment and therefore the penal section of that Act, the text of which appears as Appendix B, did not make any conduct with relation to deferment criminal. But in the Act of 1940 the local boards, through the President were given power to grant deferments and the penal section of the Act demonstrates that Congress was aware of the necessity of making certain conduct relative to deferments criminal. In the penal section it carefully provided that any one charged with the duty of carrying out any of the provisions of the Act would be guilty of a crime if he made a false deferment. The failure, therefore, of Congress in the same section to make criminal the making of a false statement to obtain deferment is of crucial significance.

There is no *authority* for the proposition that a false statement as to grounds for deferment is a false statement as to "nonliability for service" and so punishable under the Act.

In *United States v. Rooth,* 159 F. 2d 659 (C. C. A. 2, 1947), cited by the court below (2232a), the defendant was convicted of "unlawfully causing false information to be furnished to a local draft board," relating to his employment in essential industry. On appeal, the court in a *per curiam* opinion affirmed the conviction. But it did not consider the distinction between a statement as to nonliability for service and one as to deferment. It does not appear that this point was even urged.

In *United States v. Gallo,* 50 F. Supp. 158 (D. C. E. D. N. Y. 1943) the defendant was found guilty of making false statements in a questionnaire submitted to the local draft board. The statements related to his marital and dependency status. The defendant contended, not that the statements did not go to nonliability, but that they were immaterial. His contention was rejected, and it is obvious that the question herein considered was not touched upon.

On the other hand there is a decision, in which certiorari was denied by this Court, which strikingly illustrates the criminal responsibility of one who makes a false statement as to his *liability for service.* In *U. S. v. Peskoe,* 157 F. 2d 935 (C. C. A. 3, 1946), cert. den'd. 67 S. Ct. 895, also cited by the court below (2232a), the defendant falsely stated that he was a reserve Army officer and therefore relieved from liability for service under § 5 of the Act, 50 U. S. C. A. App. § 305 (a). Although Peskoe had once been a reserve Army officer, his commission had expired prior to the making of the statement to the draft board. Because this was a claim for relief from liability the Circuit Court of Appeals for the Third Circuit quite properly upheld the conviction.

The coverage of the penal section of this important federal criminal statute is an issue of first impression in

the federal courts and should be settled by this Court, so that if it is ever again necessary to use it, its meaning will be clear, or it will have been amended.

II.

Assertions That the Successful Continuance of Corporate Operations Depends Upon the Executive Head Remaining With the Corporation and That It Is Impossible to Replace Him Without Seriously Impairing Its Activities, Are Merely Expressions of Opinion and Expectation and Are Not "Statements" Proscribed by the Act.

In the second and third counts the "false statements" charged are not statements as to a past or existing fact. The pivotal affidavit stated that the "*successful continuance* of the operations" of various companies depended upon Rubinstein's "*remaining* with the said company." It also stated "that it is impossible to *replace* Serge M. Rubinstein without *seriously impairing* the drilling program and otherwise *hampering* the activities" of the said companies.

The sole question in issue, whether Rubinstein was as important to the successful operation of these companies as petitioner thought him to be was a matter of opinion only. The word "successful" labels itself as a word of opinion. So does the word "seriously." Successful operation to one man might mean something entirely different to another. Impairment of a company's program might be serious to one man and not to another. Petitioner was merely foretelling what he thought the consequences *would be*. This was not only a statement of opinion but on its face was a mere prophecy.

The court below stated that petitioner contended that statements made in support of requests for occupational deferment "of necessity had to be, but expressions of opinion" (2235a). But petitioner made no such contention. His contention was that the affidavit did contain statements of fact as well as statements of opinion, but that only the

statements of fact could be "false statements" within the meaning of the Act, and that the prosecution did not charge any statements of fact to have been false but only alleged falsity as to those assertions which were merely expressions of opinion.

Also, the Court below, while disclaiming reliance upon the proposition, declared that "the statements, however, seem to have related to his employment and his employers' need for his services as of the time they were made and thus appear to be statements of present facts so far as those facts were definitely ascertainable" (2235a). But even if these statements can be said to "relate" to Rubinstein's employment and his employers' need of his present services, such was not the issue drawn by the indictment, nor could that question properly be submitted to the jury as a basis for conviction. The charge was that petitioner's opinion of Rubinstein's *future importance* was a "false statement."

It must be remembered that there is no issue in this case in connection with counts 2 and 3 as to the *fact* of Rubinstein's employment or the various positions he held with the Companies. The prosecution does not charge that any false statements were made in either of those respects. It charged merely that the *appraisal* of Rubinstein's services by petitioner was false. It is this and only this which the prosecution challenged.

Even if petitioner were wrong in his appraisal, *can it be said he was guilty of a criminally false statement?* He has stated only his opinion of Rubinstein's importance, that others including a jury may differ does not make his statement a crime. In this case, no *fact* presented to the board as to counts 2 and 3 is charged to have been false.

The court below regarded the assertions as expressions of opinion relating to future matters but refused to hold that they could not form a basis for conviction because "the making of them implied that the makers believed them to be true" (2235a). The court concluded that if such a be-

lief were not honestly entertained the statements contained a misrepresentation of present fact (2235a).

It seems to petitioner, however, that for a statement to be criminally false at least two elements must concur: (1) the statement must be untrue when tested by presently available standards; (2) it must be believed by the maker to be false. The Court below assumed that only the second element need be present. Its opinion indicates that the statement need not in fact be false, it being necessary only that the maker believe it to be false. But, petitioner suggests that an opinion as to the future, particularly where, as here, the one stating the opinion has no control over that future, is a statement which cannot be either true or false within the meaning of a criminal statute.

The court justified its reasoning on the ground that to hold otherwise would have meant that administration of the Act "would have been overly difficult and unduly burdensome" (2235a-2236a). It is respectfully submitted that no decision of this Court or any other Court justifies creating a new principle of criminal law based upon administrative hardship.

Our research has disclosed no decided case involving the Act in which a defendant was convicted for submitting false statements where the allegations were similar in kind to the instant case. The cases in which convictions were sustained involve false statements as to a past or existing fact. See *U. S. v. Gallo,* 50 F. Supp. 158 (D. C. E. D. N. Y. 1943); *U. S. v. Peskoe,* 157 F. 2d 935 (C. C. A. 3, 1946) *Arnold v. U. S.,* 134 F. 2d 831 (C. C. A. 5, 1943). See also *U. S. v. Schachtrup,* 140 F. 2d 415, 418 (C. C. A. 7, 1944), where exaggeration and inaccuracy of detail in describing a registrant's occupation were held not to constitute a false statement.

The Court below refused to apply the rule of *Chaplin v. U. S.,* 157 F. 2d 697 (App. D. C. 1946) stating that to the extent it "may be in conflict herewith we decline to follow

it" (2236a). In that case, a conviction for obtaining money by false pretenses was reversed, because the indictment charged the defendant with securing money upon the false pretense that he "*would* purchase some liquor stamps with said money and . . . *would* return . . . any money so advanced . . " It was contended that the defendant's intention was the existing fact about which the representation had been made, but this argument was rejected by the Court.

It is to be noted that even those courts which do not go as far as the *Chaplin* case as to statements of intention, still do not extend their decisions to encompass statements of opinion, particularly where such opinion relates to the future. See *U. S. v. Hall,* 248 Fed. 150 (D. C. Montana 1918); *Little v. U. S.,* 73 F. 2d 861, 868 (C. C. A. 10, 1934); *Phillips Petroleum Co. v. Rau Const. Co.,* 130 F. 2d 499 (C. C. A. 8, 1942); *Gordon v. Butler,* 105 U. S. 553, 557 (1881).

The Court below cited several cases as being comparable to its present holding (2235a), but they do not support it.

Durland v. U. S., 161 U. S. 306; *U. S. v. Comyns, et al.,* 248 U. S. 349; *Amos v. U. S.,* 13 F. 2d 327 (C. C. A. 2); *Knickerbocker Merchandising Co., Inc., et al. v. U. S.,* 13 F. 2d 544 (C. C. A. 2); *Van Riper, et al. v. U. S.,* 13 F. 2d 961 (C. C. A. 2), and *U. S. v. Rowe, et al.,* 56 F. 2d 747 (C. C. A. 2) were all prosecutions under Section 215 of the Criminal Code, 18 U. S. C. A. 338, the text of which appears herein as Appendix C.

It is clear that the essential elements of a prosecution under that section are merely that a scheme to defraud is devised and the mails are used in furtherance of it. It is not essential to successful prosecution that a false statement be made by mail or otherwise. False statements may be significant in such prosecutions, but are not determinative either of guilt or innocence. Hence, it would appear

that in such prosecutions any representation made as to the past or present or suggestions and promises as to the future which are in fact part of a scheme to defraud or which are made with intent to defraud, are of the essence of the crime. A misrepresentation of present intent as to the future may constitute evidence of the very scheme which is proscribed. A promise which the promisor has no present intention of keeping may be fraudulent. Section 215 specifically proscribed "false or fraudulent pretenses, representations or promises." But here there is neither a promise nor a statement of intent; hence it is suggested that those decisions are not authority in the present inquiry.

U. S. v. Uram, et al., 148 F. 2d 187 (C. C. A. 2) involved an indictment under the penal provisions of the National Housing Act, Section 512 (a), 12 U. S. C. A. 1731 (a), the text of which appears herein as Appendix D. This section provides that it is an offense where anyone "wilfully overvalues any security, asset, or income." Obviously, therefore, a falsely stated opinion comes within the coverage of the statute.

In the *Uram* case, also, Section 35 of the Criminal Code, 18 U. S. C. A. 80, the text of which appears herein as Appendix E, was relied upon. But that statute, unlike the one presently involved, proscribed representations and claims which are "false, fictitious or fraudulent". The *Uram* case did not specifically hold that a present statement coupled with a false promise constituted a "false statement". No such holding was necessary to the decision.

Irish v. Central Vermont Railway, Inc., 164 F. 2d 837 (C. C. A. 2) was a civil action under the Federal Employers Liability Act, involving the validity of a certain release. It is true that the Second Circuit held in that case that a false promise was sufficient to defeat the release on the ground that it was induced by a promise that the promisor did not intend to keep. That is far different, however, from saying that such a promise is a "false statement" within

the meaning of the statute which is presently involved. Even if it were, no promise was made in the instant case.

It is respectfully submitted that in view of the conflict in the decisions in the Circuit Courts of Appeals, particularly as noted in the Opinion of the Court below, and the emergence of the Circuit Court's novel doctrine that administrative hardship relieves the prosecution of proof of guilt as defined and limited by statute, and since there is no controlling decision by this Court, the writ should be allowed.

III.

It Was Error for the Court to Refuse a Point for Charge That No Conviction Could be Had Upon a Finding That the Corporations Were Not Engaged in the War Effort to the Extent Claimed, Since the Indictment Contained No Charge of Falsity in That Respect.

Count 2 charged that false statements were made as to Rubinstein's importance to the various companies. It did not contain any charge that the companies were not engaged in war work nor in work important to the war effort. The prosecution introduced evidence that the companies were not important to the war effort to the extent claimed. This evidence properly could be considered on the issue of "wilfulness", and no complaint is made that it was admitted.

But the trial judge was asked (2156a, 2149a, 2200a-2201a, 2213a), to instruct the jury that it could not *base a conviction* upon a finding that the companies were not as essential to the war effort to the extent claimed, since that was not the crime for which petitioner was indicted. He erroneously refused so to change (2156a).

This argument was made below but the court dismissed it on the mistaken ground that the point had not been raised at this trial. It stated in a foot-note that "there was no request so to limit this evidence" (2237a). Petitioner noted in his brief before the Court below that this had been called to the trial judge's attention in points for

charge as follows: Rubinstein 55, 56, 58 (2200a-2201a), Foster 16 (2213a), all of which were refused by the trial judge (2156a, 2149a).

The jury's verdict may have rested on this invalid ground alone since the general verdict on each of these two counts did not specify the basis on which it rested. *Stromberg v. California,* 283 U. S. 359 (1931); *Williams v. North Carolina,* 317 U. S. 298 (1942).

IV.

There Is No Evidence to Show Either That Petitioner's Statements Were False or That He Did Not Believe Them to be True.

To resolve this question, an analysis of the evidence *of the prosecution* is indicated. It is to be remembered that, as the Court below conceded, the question of Rubinstein's importance to the companies, whether it concerns the present or future, is a matter of opinion and the Act was not designed by Congress to punish mistakes of judgment. Petitioner submits that since the prosecution showed that at worst there was a reasonable ground for believing either that Rubinstein would or would not be important to the companies, the prosecution necessarily failed. Otherwise criminality could be predicated upon a mere difference of opinion between petitioner and the jury which some years later tried the case. Besides, there was no showing *aliunde* that petitioner did not thoroughly believe in his assertions. No attempt to do so was even made by the prosecution.

The prosecution produced evidence as to what Rubinstein did not do in an effort to show that he was not important to the companies. They showed for instance that he was not directly in charge of various departments, that he was not in "the field" and not maintaining the oil wells nor physically engaged in drilling for wells. Upon reasoning such as that adopted by the prosecution, it could be proved that General Marshall was not essential to the war effort. There were literally thousands of things that the

General did not do in the conduct of the army. It can be said of any executive officer of any sizeable corporation in America that there are myriads of operations not only that such executive officer does not handle but with which very likely he is unfamiliar. But it could not be asserted thereby that he is not important to the successful operation of the company.

While attempting to show what Rubinstein did not do the prosecution proved what he did, the direction he gave to the company's affairs and the successful operations carried out under his management. Rubinstein's relationship to these companies as shown by the prosecution was as follows:

Midway Victory Oil Company. Rubinstein was one of the organizers and had been President of this company since 1940.

This company was in the business of drilling for production of crude oil having two offices, one at 63 Wall Street (Rubinstein's office) and another at Corpus Christi, Texas (365a).

On behalf of this company, Rubinstein approved and executed contracts with contractors who actually drilled the wells (404a).

From January, 1940, to and including February, 1943, regular monthly reports of drilling operations and logs, which were tests to determine the amount of oil, were sent to Rubinstein (405a-406a).

The prosecution witness, Duffy, stated that Rubinstein was "the boss" (382a).

Contractors' bills to this company were sent to the New York office and Rubinstein signed checks in payment (406a).

Panhandle Producing & Refining Company. A holding company which controlled both Panhandle Refining Company and Panhandle Steel Products Company. Midway Victory Oil Company (672a) purchased control of Panhandle Producing & Refining Company for $188,000 (678a).

Rubinstein became a Director (508a) and Chairman of the Board in July, 1942, and President on December 7, 1942 (526a). He was made General Manager in charge of operations January 12, 1943.

The books of account of this company were kept at 63 Wall Street, New York (402a).

Duffy, who was in Rubinstein's office at 63 Wall Street, kept the records of this company (402a).

Stanford, who had been associated with the Panhandle Group since April, 1919, said that Rubinstein talked to the heads of all departments on August 19, 1942 (512a), and on September 14, Rubinstein was again at Wichita Falls (512a) and that he saw Rubinstein in New York about August 31, 1942, at a Board of Directors meeting.

Rubinstein put Stzykgold in as his assistant in charge of production (521a, 526a, 556a-560a, 621a). Stzykgold was a competent man in the oil field and was altogether qualified, being a practical oil production man (552a, 553a)..

At the December meeting of this company, Stzykgold became Manager of field operations (521a).

The Directors' meetings of this company were held in New York (364a).

The overall policy and control of the subsidiaries of this parent company, of which Rubinstein was chief executive, was vested in it and the subsidiaries followed the will and desire of the parent company (570a).

Romeo Muller, Vice President of this company since December, 1942, said that he conducted a survey on behalf of the company and was reporting directly to Rubinstein (664a-665a).

As an example of the progress of the Panhandle Companies under Rubinstein the consolidated statement of this company and its subsidiaries showed that for the year ending December 31, 1942, the net profit was $33,678.23 (567a), for the year ending December 31, 1943, the first full year of Rubinstein's management, the net profit was $390,465.46 (567a); the net profit for the year ending De-

cember 31, 1944, was $413,000; the net profit in 1945 was $704,000 (567a).

The net profit of this company and its subsidiaries, according to the consolidated income statement for the first six months of 1942, before Rubinstein became connected with the company, was $48,316.03 and for the first six months of 1943, i. e., after he became connected with it, was $181,030.81.

Panhandle Refining Co. This company was engaged in drilling for oil and refining it. Its product was used in the production of high octane gasoline. Rubinstein became a director of this company on September 14, 1942, chairman of the Board of Directors on September 23, 1942 (1428a), and President on April 17, 1943 (586a, 1427a).

Stzykgold was the man generally responsible for the field operations of this company and that meant particularly the Production Department. Stzykgold was calling Rubinstein up all the time (564a, 565a).

Stzykgold made a general survey and sent a report to Rubinstein in July or August, 1942 (521a).

Rubinstein directed that operations in Texas would be subject to the joint agreement of Stanford as Executive Vice President and Stzykgold as General Manager (526a).

Methods and appliances for drilling operations and production purposes were greatly improved under Stzykgold's regime (556a).

In July, 1942, the Allar-Hunt lease was producing a total of about 6000 barrels a *year* (562a); by 1944, under Rubinstein's administration, it was producing about 12,000 barrels a *month* (563a).

Panhandle Steel Products Company. This company engaged in the fabrication of structural steel for bridges, buildings and roads and the making of oil field equipment (362a). Rubinstein became a Director in July, 1942; and President on November 2, 1942 (523a).

Rubinstein forced Vice President Helmcamp against his will to accept by this company an order for 1000 welded

steel floats which aided the war effort and Rubinstein at that time stated that the order should be taken whether or not it brought a profit (453a, 454a).

Helmcamp testified that from the fall of 1942 down through February 2, 1943, Rubinstein became increasingly active in the affairs of this company (454a, 455a).

When Helmcamp corresponded with Rubinstein most of it pertained to work in connection with war activity (478a-479a).

Helmcamp acted under Rubinstein with respect to procuring business in March or April, 1943 (443a).

The earnings of this company under Rubinstein increased and Rubinstein was responsible for it (455a). This too is crucial because the "false statement" as to the future was predicated not upon Rubinstein's importance directly to the "war effort" but to the companies.

Most of the correspondence between Helmcamp and Rubinstein pertained to war work because "that was the number one project of the day" (478a-479a).

Helmcamp recalled that in the fall of 1942 Rubinstein asked that a man named Roden be sent to New York for the purpose of getting business for the company (504a-505a).

An analysis of the evidence offered by the prosecution not only abundantly demonstrates that Foster believed he was right when he stated his opinion but also that he was perfectly justified in that opinion.

It is respectfully submitted therefore that the prosecution's evidence did not warrant a conviction on the second count charging the substantive offense of making a false statement. And since the prosecution relied upon the commission of the substantive offense to demonstrate the existence of the conspiracy charge in the third count, that likewise falls. *Gebardi v. United States,* 287 U. S. 112, 123; *United States v. Biggs,* 211 U. S. 507, 521; *Fain v. United States,* 209 F. 525, 531 (8 Cir.); *Fulbright v. United States,* 91 F. 2d 210 (8 Cir.).

CONCLUSION.

Petitioner respectfully submits that his conviction is unjust and should be reviewed by this Honorable Court.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX "A".

Sec. 311 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U. S. C. A. App. sec. 311.

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or

by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act."

APPENDIX "B".

Section 6 of the Selective Draft Act of 1917, 40 Stat. 76, 50 U. S. C. A. following section 226.

"Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who, in any manner, shall fail or neglect fully to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court martial and suffer such punishment as a court martial may direct."

APPENDIX "C".

Criminal Code, Section 215, 35 Stat. 1130, 18 U. S. C. A. 338.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

APPENDIX "D".

Section 512 (a) National Housing Act, 55 Stat. 365, 12 U. S. C. A. 1731 (a).

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration under this chapter, (makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper, or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passed as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited), or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000 or by imprisonment for not more than two years, or both."

APPENDIX "E".

Criminal Code, Section 35 (A), 52 Stat. 197, 18 U. S. C. A. 80.

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."